

C-0774-19-C
NO _____

SNOWBALL EXPRESS LLC	X	IN THE DISTRICT COURT
	X	
VS.	X	HIDALGO COUNTY, TEXAS
	X	
CITY OF MISSION	X	_____ JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE COURT:

SNOWBALL EXPRESS LLC, plaintiff, complains of CITY OF MISSION,
defendant, and for cause of action shows:

I.

Plaintiff is a Limited Liability Company, duly formed and existing under the laws of the State of Texas, and having its principal place of business in Hidalgo County, Texas. Defendant is the CITY OF MISSION, a Texas municipal corporation, and may be served with process by serving Dr. Armando O'caña, its Mayor, at 1201 E. 8th St., Mission, Hidalgo County, Texas.

II.

At all times material to this petition, plaintiff was and is the owner and operator of multiple locations in Hidalgo County, Texas where raspas and other related products are sold under the name of Snowball Express. Necessarily incident to the operation of this business, plaintiff has acquired rights in property, both real and personal, to carry on and conduct the business. In particular, plaintiff's assets used in the operation of its business include two locations in the city limits of Mission, to-wit: (1) 1712 W. Griffin Parkway and (2) 3124 North Mayberry Rd.

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III.

On or about November 12, 2013, the City Commission of the City of Mission approved the plaintiff's application for a Drive-Thru Service Window Conditional Use Permit (CUP) at 1712 W. Griffin Parkway, Mission, Texas. Plaintiff also met the requirements imposed for restaurants with tables outside of the building. The location also includes a walk-up window. Plaintiff applied to operate from 2 to 10:30 PM.

On or about April 24, 2017, the City Commission of the City of Mission approved the plaintiff's application for a Drive-Thru Service Window Conditional Use Permit (CUP) at 3124 N. Mayberry Rd., Mission, Texas. Plaintiff also met the requirements imposed for restaurants for the tables outside of the building. This location also includes a walk-up window. Plaintiff applied to operate from 1 to 8 PM on Monday to Friday and from 12 to 9 PM on Saturday and Sunday.

IV.

In April of 2018, plaintiff sought to amend the Conditional Use Permit (CUP) for Drive-Thru Service Window at its two Mission locations to reflect the actual operating hours. The application form required the hours of operation though the hours were not noted on the permit issued by the City at that time. In May of 2018, the City Commission considered the two Applications for amendment of the CUP and specified through ordinance that the location on Griffin Parkway must close all operations at 10 PM. A copy of Mission's Ordinance 4626 is attached as Exhibit A-1. Subsequently, plaintiff learned that it was the intent of the City of Mission that even the walk-up window which is not part of the CUP must close at 10 PM. Plaintiff has been informed by City officials

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in charge of enforcing the CUP requirements that plaintiff will be issued tickets for failing to close its walk-up window at the time specified in ordinance.

V.

Beginning in September of 2018 and continuing through February of 2019, the Police Department of the City of Mission has periodically harassed plaintiff's employees and customers of the business at Griffin Parkway by arriving in the evening with sirens blasting and overhead lights flashing on multiple police cars and parking in the middle of the driveway in order to issue a ticket for violation of the disputed CUP closing time requirement or to threaten the employees of Snowball Express LLC with arrest for not closing the walk-up window. Plaintiff has complained to the City of Mission about this activity and was assured that it would cease. However, Mission police continue the practice of using sirens and flashing lights to make it appear that serious crimes are occurring on the premises when it is merely an effort to enforce a disputed zoning ordinance.

VI.

Plaintiff would show that the ordinance in question is unconstitutional *or void or both, in* that it specifies a time for closing on non-CUP operations for which the City has not adopted any standards or objective process to apply such standards. Attached as Exhibit B-1 is a copy of the ordinance on which the City relies to assert that it has a process of issuing CUPs for Drive-Thru Window Service. Plaintiff disputes the City's contention in that the ordinance fails to set out the standards for issuance of the CUP as it does for other CUPs. See Exhibit C-1, which is a copy of Article X of Ordinance 1128, the general zoning ordinance of the City. Plaintiff contends that the ordinance in question

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is arbitrary and fails to comply with the Constitution and state law. The ordinance contains penal provisions which defendant is threatening to enforce against plaintiff, and the adoption of these provisions is beyond the scope of the authority delegated by the Constitution and the Texas legislature.

VII.

Plaintiff would show that the ordinance in question is unconstitutional *or void or both, in* that it specifies a time for closing plaintiff's operation in violation of the right to equal protection of the laws. Plaintiff is the only holder of a CUP in the City of Mission that contains a closing time requirement in its ordinance. Such singling out of one entity is prohibited by the Texas Constitution. Plaintiff contends that the ordinance should be declared unconstitutional and void.

VIII.

Without the intervention of the Court's equitable injunctive power, plaintiff and its business will suffer severe and irreparable injury to vested property rights which cannot be prevented merely by plaintiff's successful defense against criminal charges arising out of the ordinance in question. In particular, plaintiff has no other adequate remedy to prevent injury to its property rights because plaintiff is in danger of losing employees and customers because of police harassment and suffering permanent injury to its standing in the community. .

IX.

Defendant has communicated to plaintiff its intention and desire to continue to seek enforcement of the ordinance in question. The continuing police efforts to enforce

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the ordinance in question risks loss of both employee and customer relationships, as well as a loss of profits. Immediate and irreparable injury will therefore result to plaintiff unless, without notice, defendant is restrained from enforcing the requirement described above.

X.

The Affidavit of Elgin Xavier is attached hereto as Exhibit D-1.

WHEREFORE, plaintiff requests that:

1. A temporary restraining order be issued without notice to defendant, restraining defendant, its agents, servants, and employees from enforcing, directly or indirectly, the closing time provision of defendant's ordinance 4626, until further orders of the Court.
2. Defendant be cited to appear and show cause, and upon the hearing, a temporary injunction be issued, enjoining defendant, its agents, servants, and employees from enforcing, directly or indirectly, the closing time provision of Ordinance 4626, until further orders of the Court.
3. On final trial of this cause, the Court find and determine that the closing time provision of defendant's Ordinance 4626 is unconstitutional or void or both and of no force or effect, and permanently enjoin its enforcement by defendant.
4. On final trial of this cause, the Court determine the damages caused by the wrongful enforcement of the ordinance that is unconstitutional or void or both.
5. On final trial, plaintiff have judgment against defendant for all costs of court and such other and further relief to which plaintiff may be justly entitled.

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Respectfully submitted,

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By: Alex Moreno, Jr.
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ATTORNEY FOR PLAINTIFF

VERIFICATION

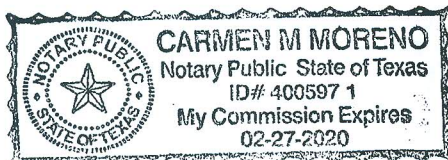
COUNTY OF HIDALGO

STATE OF TEXAS

BEFORE ME, the undersigned Notary Public, on this day personally appeared ELGIN XAVIER, President of SNOWBALL EXPRESS LLC, who being by me duly sworn on his oath deposed and said that he is the President of the plaintiff in the above-entitled and numbered cause; that he has read the above and foregoing Plaintiff's Original Petition; and that every statement contained therein is within his or her personal knowledge and true and correct.

Elgin Xavier
ELGIN XAVIER

SUBSCRIBED AND SWORN TO BEFORE ME on the 15th day of February, 2019, to certify which witness my hand and official seal.



Carmen M. Moreno
Notary Public, State of Texas